



Attorney Docket Number XMP 2037
Serial Number 09/754,347

PATENT

IN THE UNITED STATE PATENT AND TRADEMARK OFFICE

In re application of: : Gelber, Daniel et al.

For: : COMPOSITION AND METHOD FOR
: TREATING THE EFFECTS OF DISEASES
: AND MALADIES

Serial No. : 09/754,347

Filed : January 5, 2001

Art Unit : 1651

Examiner : Brett T. Ozga

Attorney Docket No. : XMP 2037

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RESPONSE TO RESTRICTION REQUIREMENT

Assistant Commissioner for Patents
Washington, DC 20231

Dear Sir:

Responsive to the Examiner's Office Action dated March 26, 2002 requiring restriction to a particular invention, the applicants, through their representatives, elect Group (I), comprising claims 1-54, with traverse. The restriction requirement is submitted to be improper because it would not be an undue burden on the office. As stated by the Examiner, Group (I) is drawn to claims classified in class 424, subclass 725 which is applicable. Applicant respectfully disagrees with the classification of Group (II) to class 424, subclass 164.1, which generally relates to proteins that bind bacterium and components thereof. In view of the foregoing the Applicant's respectfully request that the requirement be withdrawn upon reconsideration. Claims 1 to 106 remain pending in the application.

The Examiner's Office Action dated March 26, 2002 additionally required an election of species. According to the MPEP, section 809.02(a):

Action as follows should be taken:

(A) Identify generic claims or indicate that no generic claims are present. See MPEP Section 806.04(d) for definition of a generic claim.

(B) Clearly identify each (or in aggravated cases at least exemplary ones) of the disclosed species, to which claims are restricted. The species are preferably identified as the species of figures 1, 2, and 3 or the species of examples I, II, and III, respectively. In the absence of distinct figures or examples to identify the several species, the mechanical means, the particular material, or other distinguishing characteristic of the species should be stated for each species identified. If the species cannot be conveniently identified, the claims may be grouped in accordance with the species to which they are restricted.

(C) Applicant should then be required to elect a single disclosed species under 35 U.S.C. 121, and advised as to the requisites of a complete reply and his or her rights under 37 CFR 1.141.

In view of the above, the examiner has listed the following single disclosed species:

- a) Nutraceuticals;
- b) Immune boosters;
- c) Anti-inflammatories; and
- d) Antioxidants

In the Examiner's Office action, election has been requested for a specie of nutraceutical as recited in claim 6. Applicants provisionally elect prosecution of immune boosting agents as the specie of nutraceutical. The following claims are readable thereon: claims 1-7, 11-18, 20 and 24. Due to the confusion regarding the proper genus and species, Applicants are unsure whether electing the immune boosting agent as a species of nutraceutical should further require the further election of species of other non-elected species of nutraceuticals. In the Examiner's Office action, election has also been requested for the immune boosting agents. Applicants provisionally elect prosecution of at least one herb selected from a group consisting of herbs of the genus *Echinacea* as the specie of immune boosting agent. The following claims are readable thereon: claims 1-3, 6, 7, 11-18, 20 and 24. As the specie of anti-inflammatory, as recited in claim 8, Applicants provisionally elect at least one herbal extract containing at least one bioflavanoid. The following claims are further readable thereon: claims 16, 50, 51, 52, and 53. As the specie of antioxidant, Applicants provisionally elect ascorbic acid and pharmaceutically

acceptable salts thereof. The following claims are further readable thereon: claims 27, 28, 29, 30, 31, 32, 33, 36, and 42

Given that the above are the only specifically identified species and the Office Action is unclear, we hereby elect prosecution of a combination of an anti-histamine and an immune boosting agent. If further election of particular species of nutraceuticals are being requested, Applicants have provisionally made those elections.

Due to the confusion encountered with the Office Action, Applicants representative attempted to contact the Examiner on May 28, 2002 but was unsuccessful. Applicant formally requests either a personal or telephone interview with the Examiner to clear such confusion. If this is granted and Applicants response is not in accordance with the Examiner's intended request, Applicant will then submit a supplemental response to the office action dated March 26, 2002.

The Commissioner is authorized to charge any fees which may be required or to credit any overpayment to Deposit Account No. 50-0578.

Respectfully submitted,



Terry W. Kramer
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Dated: May 28, 2002

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